



State of Wisconsin
2001 - 2002 LEGISLATURE

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**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2001 ASSEMBLY BILL 322**

April 24, 2001 - Offered by Representative KEDZIE.

1 **AN ACT** *to repeal* 23.321 (1) (c); *to renumber* 23.321 (title) and (1) (title), (a) and
2 (b), 23.321 (1) (d) to (f) and 23.321 (2); *to renumber and amend* 23.321 (2m)
3 to (5); *to amend* 281.22 (title), 281.22 (3), 281.69 (3) (b) 2., 281.98 (1) and
4 299.95; and *to create* 281.01 (21), 281.22 (4) and 281.36 of the statutes;
5 **relating to:** water quality certification for nonfederal wetlands, time limits for
6 processing applications for water quality certifications, granting rule-making
7 authority, and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

8 **SECTION 1.** 23.321 (title) and (1) (title), (a) and (b) of the statutes are
9 renumbered 281.37 (title) and (1) (title), (a) and (b).

10 **SECTION 2.** 23.321 (1) (c) of the statutes is repealed.

11 **SECTION 3.** 23.321 (1) (d) to (f) of the statutes are renumbered 281.37 (1) (d) to
12 (f).

1 **SECTION 4.** 23.321 (2) of the statutes, as created by 1999 Wisconsin Act 147, is
2 renumbered 281.37 (2).

3 **SECTION 5.** 23.321 (2m) to (5) of the statutes are renumbered 281.37 (2m) to (5),
4 and 281.37 (2m) (a) and (b) 3., as renumbered, are amended to read:

5 281.37 **(2m)** (a) 1. A person who is the holder of a permit or other approval that
6 authorizes a mitigation project shall grant a conservation easement under s. 700.40
7 to the department to ensure that a wetland that is being restored, enhanced, or
8 created will not be destroyed or substantially degraded by any subsequent ~~owner~~
9 proprietor of or holder of interest in the property on which the wetland is located.
10 The department shall revoke the permit or other approval if the holder of the permit
11 or other approval fails to take these measures.

12 2. A person who is restoring, enhancing, or creating a wetland to provide
13 transferable credits as part of a wetlands mitigation bank shall grant a conservation
14 easement under s. 700.40 to the department, to ensure that the wetland will not be
15 destroyed or substantially degraded by any subsequent ~~owner~~ proprietor of or holder
16 of interest in the property on which the wetland is located.

17 (b) 3. Any subsequent ~~owner~~ proprietor of or holder of interest in the property
18 on which the wetland specified in subd. 1. is located did not contribute to the loss of
19 the wetland.

20 **SECTION 6.** 281.01 (21) of the statutes is created to read:

21 281.01 **(21)** "Wetland" has the meaning given in s. 23.32 (1).

22 **SECTION 7.** 281.22 (title) of the statutes is amended to read:

23 **281.22** (title) **Fees and time limits for water quality determinations for**
24 **wetlands.**

25 **SECTION 8.** 281.22 (3) of the statutes is amended to read:

1 281.22 (3) EXEMPTIONS FROM FEES. ~~This section does~~ Subsections (1), (2) and
2 (2m) do not apply to any federal agency or state agency.

3 **SECTION 9.** 281.22 (4) of the statutes is created to read:

4 281.22 (4) TIME LIMITS. The department shall promulgate a rule to establish
5 time limits for the steps involved in processing, approving, and denying applications
6 for water quality certifications under s. 281.36 and for other determinations that the
7 department makes as to whether projects comply with the standards of water quality
8 established by rules promulgated under s. 281.15 that are applicable to wetlands.
9 Upon referral of any proposed rule under this subsection to the presiding officers of
10 each house of the legislature under s. 227.19 (2), the presiding officers shall refer the
11 proposed rule to a senate committee and an assembly committee concerned with the
12 environment.

13 **SECTION 10.** 281.36 of the statutes is created to read:

14 **281.36 Water quality certification for nonfederal wetlands. (1)**

15 DEFINITIONS. In this section:

16 (a) "Additional federal law or interpretation" means any of the following:

17 1. An amendment to 33 USC 1344 (f) that becomes effective after January 9,
18 2001.

19 2. Any other federal statutory provision that affects the exemptions under 33
20 USC 1344 (f) and that becomes effective after January 9, 2001.

21 3. A regulation, rule, memorandum of agreement, guidance letter, interpretive
22 document, or other provision established by a federal agency that is promulgated or
23 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
24 1344 (f), that applies to wetlands located in this state, and that becomes effective
25 after January 9, 2001.

1 4. A decision issued by a federal district or federal appellate court that affects
2 the application of a federal amendment or provision described in subds. 1. to 3., that
3 applies to wetlands located in this state, and that is issued after January 9, 2001.

4 (b) "Existing federal law or interpretation" means any of the following:

5 1. 33 USC 1344 (f), as amended to January 8, 2001.

6 2. A regulation, rule, memorandum of agreement, guidance letter, interpretive
7 document, or other provision established by a federal agency that is promulgated or
8 adopted pursuant to 33 USC 1344 (f) or that is used to interpret or implement 33 USC
9 1344 (f), that applies to wetlands located in this state, and that is in effect on January
10 8, 2001.

11 3. A decision issued by a federal district or federal appellate court that affects
12 the application of a federal statute or provision described in subd. 1. or 2., that
13 applies to wetlands located in this state, and that is issued on or before January 8,
14 2001.

15 (bn) "Governmental unit" means the federal government, the state, a city, a
16 village, a county, or a town.

17 (c) "Nonfederal wetland" means a wetland that is identified as such under sub.
18 (1m).

19 (d) "Water quality standards" means water quality standards set under rules
20 promulgated by the department under s. 281.15.

21 **(1m) DETERMINATION OF NONFEDERAL WETLANDS.** (a) A wetland is identified as
22 a nonfederal wetland if either of the following applies:

23 1. Any discharges of dredged or fill material into the wetland are determined
24 not to be subject to regulation under 33 USC 1344 due to the decision in Solid Waste
25 Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (U.S.

1 Jan. 9, 2001) or any subsequent interpretations of that decision by a federal agency
2 or by a federal district or federal appellate court that applies to wetlands located in
3 this state.

4 2. The wetland is determined to be a nonnavigable, intrastate, and isolated
5 wetland under the decision in Solid Waste Agency of Northern Cook County v. U.S.
6 Army Corps of Engineers, No. 99-1178 (U.S. Jan. 9, 2001) or any subsequent
7 interpretations of that decision by a federal agency or by a federal district or federal
8 appellate court that applies to wetlands located in this state.

9 (b) For the purpose of identifying wetlands under par. (a):

10 1. If the U.S. army corps of engineers issues a determination as to whether a
11 wetland is a nonfederal wetland, the department shall adopt that determination.

12 2. If the U.S. army corps of engineers does not issue a determination as to
13 whether a wetland is a nonfederal wetland, the department shall determine whether
14 the wetland is a nonfederal wetland.

15 **(2) CERTIFICATION REQUIREMENT.** No person may discharge dredged or fill
16 material into a nonfederal wetland unless the discharge is authorized by a water
17 quality certification issued by the department under this section. No person may
18 violate any condition imposed by the department in a water quality certification
19 under this section. The department may not issue a water quality certification under
20 this section unless it determines that the discharge will comply with all applicable
21 water quality standards.

22 **(3) DELINEATION PROCEDURES.** For purposes of delineating the boundary of a
23 nonfederal wetland, the department and the person who is applying for or who holds
24 a water quality certification under this section shall use the procedures contained
25 in the wetlands delineation manual published by the U.S. army corps of engineers.

1 The edition of the manual that shall be used shall be the 1987 edition of the manual
2 and any document that the U.S. army corps of engineers issues interpreting that
3 manual, unless the U.S. army corps of engineers publishes an edition of the manual
4 after January 9, 2001, and the department by rule designates that edition as the one
5 to be used under this subsection. If the U.S. army corps of engineers issues a
6 guidance document interpreting the edition of the wetlands delineation manual that
7 the department is required to use under this subsection and if that guidance
8 document is issued after the effective date of this paragraph [revisor inserts date],
9 the department shall notify the appropriate standing committee of each house of the
10 legislature, as determined by the speaker of the assembly and the president of the
11 senate, of the issuance of the guidance document and whether the department
12 intends to promulgate a rule incorporating the provisions of the guidance document.

13 (4) EXEMPTIONS. Except as provided in sub. (5), the certification requirement
14 under sub. (2) does not apply to any discharge that is the result of any of the following
15 activities:

16 (a) Normal farming, silviculture, or ranching activities.

17 (b) Maintenance, emergency repair, or reconstruction of damaged parts of
18 structures that are in use in a nonfederal wetland.

19 (c) Construction or maintenance of farm ponds, stock ponds, or irrigation
20 ditches.

21 (d) Maintenance of drainage ditches.

22 (e) Construction or maintenance of farm roads, forest roads, or temporary
23 mining roads that is performed in accordance with best management practices, as
24 determined by the department, to ensure all of the following:

1 1. That the flow and circulation patterns and chemical and biological
2 characteristics of the affected nonfederal wetland are not impaired.

3 2. That the reach of the affected nonfederal wetland is not reduced.

4 3. That any adverse effect on the aquatic environment of the affected
5 nonfederal wetland is minimized to the degree required by the department.

6 **(5) INAPPLICABILITY OF EXEMPTIONS.** Notwithstanding sub. (4), a discharge that
7 would be exempt under sub. (4) is subject to the certification requirement under sub.
8 (2) if the discharge is incidental to an activity that has as its purpose bringing a
9 nonfederal wetland, or part of a nonfederal wetland, into a use for which it was not
10 previously subject and if the activity may do any of the following:

11 (a) Impair the flow or circulation of any nonfederal wetland.

12 (b) Reduce the reach of any nonfederal wetland.

13 **(6) RULES FOR EXEMPTIONS.** (a) The department shall promulgate rules to
14 interpret and implement the provisions under subs. (4) and (5). In promulgating
15 these rules, the department shall do all of the following:

16 1. Make the rules consistent with existing federal law.

17 2. Incorporate any additional federal law or interpretation into the rules.

18 (b) Whenever an additional federal law or interpretation is initially
19 incorporated into the rules, the department may modify the additional federal law
20 or interpretation as it determines is necessary, but the department may not
21 otherwise amend or modify any of the rules promulgated under this subsection.

22 **(7) RULES PROHIBITION.** The department may not promulgate or enforce a rule
23 requiring a person who submits an application for a water quality certification under
24 this section for the discharge of dredged or fill material into a nonfederal wetland to
25 submit a description of practicable alternatives to the discharge or to submit a

1 description of any investigation conducted to determine the viability of such
2 alternatives if the area to be filled is less than one acre in size and a governmental
3 unit has determined that the discharge is necessary for public safety.

4 (8) GENERAL WATER QUALITY CERTIFICATIONS. (a) In lieu of issuing individual
5 water quality certifications under this section, the department may issue a general
6 water quality certification for types of discharges that the department determines
7 are similar in nature or for the purpose of simplifying the certification process if the
8 discharges meet all of the following standards:

9 1. The discharges will cause only minimal adverse environmental effects, as
10 determined by the department, if they are performed separately.

11 2. The cumulative adverse effect on the environment by the discharges will be
12 minimal, as determined by the department.

13 (b) No general water quality certification issued under par. (a) may be effective
14 for more than 5 years after the date of its issuance.

15 (bn) 1. The department shall issue general water quality certifications that are
16 consistent with all of the general permits issued under 33 USC 1344 (e) that applied
17 on January 8, 2001, to nonfederal wetlands located in this state.

18 2. If a general permit as specified in subd. 1. is amended or modified after
19 January 8, 2001, the department shall incorporate the amendments or modifications
20 into the general water quality certification issued under subd. 1. and may not
21 otherwise amend or modify the general water quality certification.

22 (c) If the department determines that any of the discharges under a general
23 water quality certification issued under par. (a) fails to meet any of the standards in
24 par. (a), the department shall modify the certification so that the discharges meet all
25 of the standards. If the department cannot modify the certification so that all of the

1 standards will be met or if the department determines that the discharges subject
2 to the general certification are more appropriately certified by using individual
3 water quality certifications, the department shall revoke the general certification.

4 (d) Before issuing, modifying, or revoking a general water quality certification
5 issued under par. (a), the department shall provide notice and a hearing under ss.
6 227.17 and 227.18.

7 **(9) INSPECTION AUTHORITY.** (a) For purposes of enforcing this section, any
8 employee or other representative of the department, upon presenting his or her
9 credentials, may do any of the following:

10 1. Enter and inspect any property on which is located a nonfederal wetland, or
11 part of a nonfederal wetland, for which an application for a water quality
12 certification has been submitted to the department.

13 2. Enter and inspect any property on which is located a nonfederal wetland to
14 investigate a discharge of dredged or fill material that the department has reason
15 to believe is in violation of this section.

16 3. Gain access to and inspect any records that the department requires a holder
17 of a water quality certification to keep.

18 (am) An employee or representative of the department may not exercise the
19 authority granted under par. (a) 1. before the date on which the application is
20 submitted. If the application is denied or withdrawn, an employee or representative
21 of the department may not exercise this authority after the date on which the
22 application is denied or withdrawn. If the application is approved, an employee or
23 representative of the department may not exercise this authority after the 20th day
24 immediately following the completion of the discharge of the dredged or fill material.

1 (ar) 1. Before entering and inspecting a property under par. (a) 2., the
2 department shall make at least one of the following requests:

3 a. A request for consent from the proprietor to enter and inspect the property.

4 b. A request, orally or in writing, that the proprietor provide an oral or written
5 explanation, as elected by the department, concerning the activity that the
6 department has reason to believe may constitute a violation of this section.

7 2. a. If the proprietor grants consent for the entry on, and the inspection of, the
8 property to investigate a discharge as authorized under par. (a) 2., the department,
9 upon reasonable advance notice, may enter and inspect the property in compliance
10 the terms of the consent granted by the proprietor.

11 b. If the proprietor refuses to grant consent for the entry on, or the inspection
12 of, the property or if the proprietor's explanation or terms of consent are not
13 acceptable to the department of natural resources, the department of natural
14 resources may refer the matter to the department of justice for enforcement under
15 s. 299.95.

16 c. If the proprietor fails to respond to all requests made under subd. 1., an agent
17 of the department of natural resources may apply for, obtain, and execute a special
18 inspection warrant under s. 66.0119. The department shall give the proprietor
19 reasonable advance notice of its intent to apply for the warrant.

20 3. Any employee or representative of the department may make the requests
21 under subd. 1., enter or inspect property under subd. 2. a., or execute a warrant under
22 subd. 2. c. only during reasonable hours.

23 (b) Any employee or representative of the department may exercise the
24 authority granted under par. (a) 1. or 3. only during reasonable hours and only after

1 the department has provided reasonable advance notice to the proprietor of the
2 property involved or to the holder of the water quality certification.

3 (c) An employee or representative of the department may not gain access to or
4 inspect any records as authorized under par. (a) 3. unless the holder of the water
5 quality certification, or the holder's designee, is present or unless the holder of the
6 certification waives this requirement.

7 **(10) OTHER REQUIREMENTS.** This section does not affect the authority of the
8 department to do any of the following:

9 (a) Regulate the discharge of dredged or fill material in a nonfederal wetland
10 under ss. 59.692, 61.351, 62.231, 87.30, 281.11 to 281.35, 281.41 to 281.47, or 281.49
11 to 281.85 or ch. 30, 31, 283, 289, 291, 292, 293, 295, or 299.

12 (b) Issue a water quality certification under rules promulgated under this
13 chapter to implement 33 USC 1341 (a).

14 **SECTION 11.** 281.69 (3) (b) 2. of the statutes is amended to read:

15 281.69 (3) (b) 2. The restoration of a wetland, as defined in s. ~~23.32 (1)~~, if the
16 restoration will protect or improve a lake's water quality or its natural ecosystem.

17 **SECTION 12.** 281.98 (1) of the statutes is amended to read:

18 281.98 (1) Except as provided in ss. 281.47 (1) (d), 281.75 (19), and 281.99 (2),
19 any person who violates this chapter or any rule promulgated or any plan approval,
20 license ~~or~~, special order, or water quality certification issued under this chapter shall
21 forfeit not less than \$10 nor more than \$5,000 for each violation. Each day of
22 continued violation is a separate offense. While an order is suspended, stayed, or
23 enjoined, this penalty does not accrue.

24 **SECTION 13.** 299.95 of the statutes is amended to read:

1 **299.95 Enforcement; duty of department of justice; expenses.** The
2 attorney general shall enforce chs. 281 to 285 and 289 to 295 and this chapter, except
3 ss. 281.48, 285.57, 285.59, and 299.64, and all rules, special orders, licenses, plan
4 approvals and, permits, and water quality certifications of the department, except
5 those promulgated or issued under ss. 281.48, 285.57, 285.59, and 299.64 and except
6 as provided in s. 285.86. The circuit court for Dane county or for any other county
7 where a violation occurred in whole or in part has jurisdiction to enforce chs. 281 to
8 285 and 289 to 295 or this chapter or the rule, special order, license, plan approval
9 or, permit, or certification by injunctive and other relief appropriate for
10 enforcement. For purposes of this proceeding where chs. 281 to 285 and 289 to 295
11 or this chapter or the rule, special order, license, plan approval or, permit or
12 certification prohibits in whole or in part any pollution, a violation is considered a
13 public nuisance. The department of natural resources may enter into agreements
14 with the department of justice to assist with the administration of chs. 281 to 285 and
15 289 to 295 and this chapter. Any funds paid to the department of justice under these
16 agreements shall be credited to the appropriation account under s. 20.455 (1) (k).

17 **SECTION 14. Nonstatutory provisions.**

18 (1) TEMPORARY PROCESS.

19 (a) In this subsection, “existing federal law or interpretation” has the meaning
20 given in section 281.36 (1) (b) of the statutes, as created by this act.

21 (b) Except as provided in paragraph (c), no person may discharge dredged or
22 fill material into a nonfederal wetland before the date on which the rules required
23 under section 281.36 (6) of the statutes, as created by this act, are effective unless
24 one of the following applies:

